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No. 87-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

—v.—

JACK ABBOTT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE *AMICI CURIAE*, ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE AUTHORS LEAGUE OF AMERICA, INC. AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS

R. BRUCE RICH
Counsel of Record

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for the
AMICI CURIAE

HOLLY J. GREGORY
WEIL, GOTSHAL & MANGES
Of Counsel

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PRELIMINARY STATEMENT

The Association of American Publishers, Inc., The Authors League of America, Inc. and the International Periodical Distributors Association, Inc. submit this brief *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of respondents. This brief is submitted upon the written consent of petitioners and respondents, filed herewith.

Amici urge this Court to affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Abbott* v. *Meese*, 824 F.2d 1166 (D.C. Cir. 1987), for the reasons set forth herein.

THE *AMICI*

The Association of American Publishers, Inc. ("AAP") is the major national association of book publishers in the United States organized under the laws of the State of New York. AAP's more than 225 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university presses and scholarly associations. Together, AAP's members publish the majority of all general and educational books published in the United States.

The Authors League of America, Inc. ("Authors League") is the major national society of professional authors, representing more than 14,500 authors, dramatists and journalists. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that fundamental constitutional right.

The International Periodical Distributors Association, Inc. ("IPDA") is a not-for-profit trade association organized under the laws of the State of New York. It is the trade association for principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to over 400 wholesalers throughout the United States for ultimate distribution to retailers and the public.

Among the wide range of books and periodicals published and distributed by *amici*'s members are diverse works[1] dealing

1. Two of the publications censored under the regulations at issue in this case, *The David Kopay Story* and *Soledad Brother: The Prison Letters of George Jackson*, were published by Bantam Books. Bantam is not a plaintiff in this case but is a member of AAP.

with the issues of crime, prisons, race-relations and sexuality. Such works, by distinguished scholars, biographers, journalists and novelists, include fact and fiction and span disciplines such as history, sociology, psychology and criminology.

INTERESTS OF THE *AMICI*

From early in our nation's history, the press has played a vital role in the development, dissemination and preservation of ideas and knowledge. By promoting the free exchange of ideas, the publishing industry provides an invaluable service to our society: It ensures the public's access to the widest possible range of ideas by fostering an atmosphere that allows room for the unorthodox and unpopular alongside the accepted and conventional, and protects against the imposition of the political, moral or aesthetic views of any one group upon adherents to other viewpoints.

AAP, Authors League and IPDA have appeared frequently as *amici* in cases where the conduct of government officials and agencies has threatened the vitality of a free press by impeding their performance of these central First Amendment functions. This is such a case. *Amici* appear here to caution that, although directed at prison inmates, the Bureau of Prisons' (the "Bureau") censorship regulations have far broader effect by impermissibly restricting the freedom of the press. While the regulations appear merely to proscribe what prisoners may read, they additionally impact upon the expression of publishers and writers by inhibiting dissemination of the written word. The regulations thereby imperil First Amendment guarantees to a far greater degree than has been acknowledged by the government.

Viewed in its proper context, this case presents a conflict between the great latitude traditionally afforded to freedom of expression and the government's legitimate interest in maintaining order, security and rehabilitation within its federal prisons. The government would resolve this conflict by giving short shrift to the critical First Amendment rights of publishers and

authors here at stake. For the government, a hypothetical concern over the potentially disruptive effect of a publication suffices to permit prison authorities to deny prisoners access to that publication. For the government, the impact of such a standard upon the First Amendment rights of publishers and authors is a matter of little consequence.

The Court should reject the government's facile and constitutionally insensitive approach to the balancing of interests involved in this case. The First Amendment rights at stake here will be safeguarded adequately only if this Court reaffirms a reviewing standard that requires more than merely a hypothetical link between a censored publication and threatened disruption of prison order and security. To hold otherwise would relegate free speech to secondary importance without requiring prison officials to establish the purported danger to their interest in terms that address the actual exigencies of specific situations. Vague generalities addressed to "order and security" cannot, and should not, justify indiscriminate censorship.

Censorship, however motivated, necessarily intrudes on the creative process by mandating limits which confine and distort the ultimate expression of ideas. Censorship compels publishers and writers to conform their publications to the censors' viewpoint or relinquish an audience for their works. In the instant case, the Bureau's censorship regulations have the disconcerting effect of shrinking an audience for controversial works and isolating prison inmates from the very world to which the prison system would return them rehabilitated.

The prison censorship regulations here under review reflect an increasing tendency to shield segments of society from "dangerous" ideas. Recent history has witnessed a disturbing number of such attempts, through efforts to restrict access to protected expression on the misguided premise that the messenger chronicling complex social issues itself causes, or exacerbates, what are in actuality deeply rooted social problems. It is "[t]he eternal temptation to arrest the speaker rather than to correct the conditions about which he complains." *Houston* v. *Hill*, ____U.S.____, 107 S. Ct. 2502, 2511 n.15 (1987) (quoting

Younger v. *Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting)). The notion that works which address these very real problems—offering insights and compassion, and lending hope and dignity to them—would be the target of censors, is antithetical to the First Amendment, the very purpose of which is to encourage open discourse on matters of social and political import free of governmental interference. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Whitney* v. *California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Amici urge that this Court curtail the authority of prison officials, exercised in the guise of ensuring order and security, to infringe upon the constitutional rights of non-inmate publishers and writers to have their works freely circulated and read. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 65 n.6 (1963); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938). Unless prison officials can justify the content regulation promoted by the censorship regulations as generally necessary to maintain order and security, materials published by the press should not be subject to restriction within prisons. Where, as here, government officials have abused their discretion under a vague and overbroad regulation that allows ideological censorship, this Court should not hesitate to perform its traditional function of correcting the constitutional imbalance.

Accordingly, this Court should affirm the Court of Appeals' decision applying intermediate scrutiny to the censorship of published materials within the prison system and reaffirm the importance of the values of free expression sought to be trivialized by the government.

STATEMENT OF THE CASE

The Overly Broad And Vague Regulations

The Bureau's regulations here in issue require prison employees and officials to determine, with little guidance and on the basis of the ideas the publications express, whether a particular

publication poses a danger to the security and order of the prison. The regulations authorize prison officials—in the first instance, mailroom employees—to reject a publication deemed "detrimental to the security, good order or discipline" of the prison. 28 C.F.R. § 540.71(b) (1986).

Aside from the general and open-ended guidelines contained in 28 C.F.R. § 540.71(b)(2), (5)-(7) (1986), the regulations do not set forth the specific acts or conduct that, if depicted in a publication, would constitute grounds for rejection.[2] Those guidelines permit, but do not mandate, the rejection of a publication if:

> (2) It depicts, encourages or describes methods of escape from correctional facilities . . .
>
> . . .
>
> (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
>
> (6) It encourages or instructs in the commission of criminal activity;
>
> (7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

28 C.F.R. § 540.71(b)(2), (5)-(7). The non-exhaustive general criteria listed above fail to provide mailroom personnel and wardens with any specific instructions for the interpretation and application of the regulations. The censorship regulations

2. Certain sections of the Bureau's regulations were not challenged. These permit rejection of a publication if:

> (1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;
>
> (2) It . . . contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;
>
> (3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;
>
> (4) It is written in code.

28 C.F.R. § 540.71(b)(1)-(4) (1986).

themselves, therefore, leave unanswered the question of what is "detrimental" to "security, good order or discipline," 28 C.F.R. 540.71(b). That determination is left to the discretion—in the form of personal opinion—of prison employees, a discretion that is not appreciably limited by the non-exhaustive "criteria" contained in the censorship regulations. Pet. App. at 29(a).[3]

The Suspect Process of Censorship

The record fully supports respondents' contention that the evaluations of incoming publications are superficial at best. Publications mailed to prisoners are delivered to the prison mailroom personnel for review. That initial screening is cursory, lasting only seconds. J.A. at 96. If a mailroom worker flags a publication as objectionable, he or she forwards it to another employee, usually the Supervisor of Education, for review. J.A. at 96-97. This review is similarly cursory, taking at most a few minutes. Witkowski Dep. at 11-12. If the mailroom worker's censorship determination is affirmed, the Supervisor of Education forwards the publication to the Warden for final review. Several Wardens conceded, however, that they rarely reverse a recommendation to censor a publication. Fenton Dep. at 88-89; Witkowski Dep. at 14. One Warden even admitted that he did not read the publications sent to him for review before rubber-stamping the previous rejections:

> 'We don't read the articles. I'm not interested in the articles, and the mailroom isn't. They don't have time to read articles, and I don't either.

J.A. at 77.

The regulations require the mailroom workers and prison officials to rely on their own personal beliefs to evaluate incom-

3. "Pet. App." refers to the Petitioners' Appendix on Writ of Certiorari; "J.A." refers to the Joint Appendix; "Dep." refers to the depositions which were admitted into evidence (Trial Transcript, 1548, 1551); "Adm." refers to the Defendants' (Petitioners') Responses to Plaintiffs' Requests for Admissions; "P. Exh." refers to Plaintiffs' Exhibits submitted into evidence at trial.

ing publications.[4] The mailroom personnel and the censoring officials receive no formal training in interpreting or applying the vague censorship regulations. Spidle Dep. at 72-73; Nave Dep. at 76; Fenton Dep. at 85-86, 114; Hanberry Dep. at 14; Witkowski Dep. at 4-5. The Lewisburg Warden justified this lack of training by stating, "if the mailroom worker has any brains at all, he's supposed to know if something is going to cause a problem." Fenton Dep. at 86. The evaluation of incoming publications thus necessitates reliance on the personal predilections of both the mailroom personnel and their superiors.

The impact of the censorship regulations is compounded by the "all or nothing" rule under which an entire publication is rejected if one article—or one paragraph or one sentence—is deemed objectionable. The mailroom personnel and their superiors thus reject entire publications after only a brief review, cursory and superficial at best.

The Banned Publications

The government's interest in promoting order, security and rehabilitation within its federal prisons concededly must entail content-based choices and value judgments related to penological goals. However, the actions of the prison officials under the challenged regulations amount to viewpoint-based censorship, exercised with neither professionalism nor restraint and justified by only the most tenuous connection to legitimate concerns. Even a cursory review of the censored publications in the

4. The record amply supports the contention that the Bureau's censorship regulations allow for—indeed, even require—the assertion of personal prejudices in the review of publications. One mailroom worker at Lewisburg described the standards she employed in reviewing incoming publications, standards she herself created:

> Sex is a standard. Radical is a standard. I will go out on a limb and say Communism and Fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

J.A. at 97. A Supervisor of Education who reviews the determinations of the mailroom staff admitted that he relied on "personal opinion." Nave Dep. at 76.

instant case reveals that the regulations have operated to exclude those publications that advocate or describe unconventional ideas and ways of life.

For example, prison officials in Atlanta and Marion excluded *The David Kopay Story*, the autobiography of a professional football player, because it was "used to entice and propagate the gay movement," J.A. at 118, Adm. #635, and because the "[h]omosexual nature of the book was not in the best interest of the orderly running of the institution," J.A. at 116, Adm. #626. *See also* J.A. at 117, Adm. #632. The autobiography, which is devoid of explicit depictions of sexual acts, poignantly describes the tension Kopay experienced in accepting his own homosexuality while the media proclaimed him a macho football hero. Yet the federal prisons in Atlanta and Marion rejected the book even though concededly it did not "advocate assaults or rapes . . . ." J.A. at 118, Adm. #634. Notably, other federal maximum security prisons—Terre Haute, J.A. at 116, Adm. #625, McNeil Island, J.A. at 116-17, Adms. #628, #629, and Leavenworth, J.A. at 117, Adm. #630,—accepted Kopay's book and delivered it to inmates without disturbance. Nothing in the record indicates that circumstances unique to the Atlanta and Marion prisons justified the book's rejections there. Thus, Kopay's book was rejected not because its contents provided a tangible threat to prison security, but rather, because it was sympathetic to the gay movement[5] and thereby addressed a topic antagonistic to the views of the censors.

Prison officials have relied on the Bureau's censorship regulations to reject as well publications that advocate unorthodox political ideas. Without specifying the particular passage or section of the book that they deemed would threaten security, prison officials excluded *Soledad Brother: The Prison Letters of George Jackson* on the grounds that it "enable[s] or otherwise advocate[s] conduct which cannot be permitted in a prison

5. Prison officials also censored issues of *Workers' World* and *Join Hands* on the grounds that they "support . . . the gay rights of inmates," J.A. at 126, Adm. #934, and "advocate[ ] homosexuality," J.A. at 121, Adm. #760.

setting," P. Exh. 67, and "tend[s] to compromise the discipline and good order of the institution," P. Exh. 68.

Described by *The New York Times Book Review* as "one of the finest pieces of black writing ever to be printed," Lester, "Review of *Soledad Brother*," *N.Y. Times Book Review*, November 22, 1970, at 10, col. 4, Jackson's book is composed of letters written to his immediate family, his attorney and others during his incarceration:

> I know that few blacks over here have ever been free. The forms of slavery merely *changed* at the signing of the Emancipation Proclamation from chattel slavery to wage slavery. If you could see and talk to some of the blacks I meet in here you would immediately understand what I mean, and see that I'm right. They are all average, all with the same backgrounds, and in for the same thing, some form of food getting. About 70 to 80 percent of all crime in the U.S. is perpetrated by blacks, "the sole reason for this is that 98 percent of our number live below the poverty level in bitter and abject misery!" Take off your rose-colored glasses and stop pretending. We have suffered an unmitigated wrong! How do you think I felt when I saw you come home each day a little more depressed than the day before? How do you think I felt when I looked in your face and saw the clouds forming, when I saw you look around and see your best efforts go for nothing—nothing. I can count the times on my hands that you managed to work up a smile.

G. Jackson, *Soledad Brother: The Prison Letters of George Jackson*, 65 (1970) (original emphasis). As this excerpt from a letter to his father movingly portrays, the book records "one man's solitary act of willing himself to exist on the basis of his rage at what had been done to him as a black." Lester, "Review of *Soledad Brother*," *N.Y. Times Book Review*, November 22, 1970, at 10, col. 4. It is a political statement, the impact of which "may be even greater" than that of "The Autobiography

of Malcolm X." *Id.* The political nature[6] of Jackson's book is precisely what prompted mailroom employees and their superiors to reject the publication.

ARGUMENT

I.

THE BUREAU OF PRISONS' CENSORSHIP REGULATIONS WORK AN UNCONSTITUTIONAL RESTRICTION ON THE FIRST AMENDMENT RIGHTS OF FREE CITIZENS—NOTABLY THE PRESS

The government narrowly frames the issue presented by this case to involve the standard of scrutiny which should apply to regulations that implicate *prisoners'* First Amendment rights. However, "[t]he Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978). As the Court of Appeals recognized, the First Amendment interests to be considered in this case transcend those of the prisoners. They involve centrally the rights of a free press to disseminate ideas free of government censorship. Accordingly, the constitutional interests to be taken account of in this case are far more weighty than suggested by the government. Indeed, the key issue in this case involves determining the level of scrutiny that will accommodate the legitimate concern for maintaining order and security in the prisons while safeguarding the freedoms that authors, publishers and their distributors are guaranteed by the First Amendment.

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6. Prison officials similarly censored political speech when they rejected magazines such as *The Labyrinth* and *The Torch*. The April, 1977 issue of *The Labyrinth* criticized the medical treatment of inmates, and was rejected as "inflammatory," J.A. at 122, Adm. #772, and "slanted," Williams Dep. at 121. Prison officials rejected *The Torch* because it "has a tendency to develop an adversary attitude by inmates toward staff which can cause an unhealthy environment in this institution." J.A. at 125, Adm. #912.

A. The Censorship Regulations Restrict Dissemination Within Prisons Of Works On Controversial Public Affairs—Speech That Is At The Heart Of The First Amendment's Protection

As the founders of this nation understood, "[w]here the press is free, and every man able to read, all is safe." Letter to Col. Charles Yancey in 14 *The Writings of Thomas Jefferson* 384 (Lipscomb Ed. 1904) (quoted in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 260 n.2 (1974) (White, J., concurring)). They therefore amended our Constitution to read: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The press' special role "in informing and educating the public, offering criticism, and providing a forum for discussion and debate" is thus explicitly "constitutionally recognized." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. at 781. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting). The stated rationale for fostering and preserving this special role is the encouragement of informed democratic self-rule: "[S]peech concerning public affairs . . . is the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964), *overruled on other grounds by Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), "[a]nd self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources,' " *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. at 777 n.12 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).

The speech restricted by the Bureau's censorship regulations is at the very heart of the First Amendment's protection:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

> or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. *Alabama*, 310 U.S. 88, 101-02 (1940); *see also Hustler Magazine* v. *Falwell*, ____ U.S. ____, 108 S. Ct. 876, 879 (1988) ("[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (the First Amendment ensures that debate on public issues remain "uninhibited, robust, and wide-open"); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (the First Amendment was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources"). Speech that criticizes government and addresses the problems of society is entitled to the highest degree of First Amendment protection. Ordinarily, any restriction of such speech is subject to the strictest scrutiny and is upheld only if it serves a "compelling" or "substantial" state interest and is "narrowly drawn" or "finely tailored" to achieve its goal. *See Arkansas Writers' Project, Inc.* v. *Ragland*, ____ U.S. ____, 107 S. Ct. 1722, 1728 (1987); *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980). *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 101 (1972) ("narrowly tailored to [the government's] legitimate objectives").

The majority of the publications censored by the Bureau involve matters of public affairs[7] and thus fall within this Court's description of core protected speech. Some, like *The Guardian*, a political news magazine, and *The Labyrinth*, a magazine critical of prison administration and prison medical care, are critical of the criminal justice and penal systems. Others, like *The David Kopay Story*, or *Soledad Brother: The Prison Letters of George Jackson*, discuss controversial views

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7. Unlike obscenity, *Miller* v. *California*, 413 U.S. 15 (1973), advocacy of imminent lawless action, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), libel, defamation or fraud, *see Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Beuharnais* v. *Illinois*, 343 U.S. 250 (1952), or "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the censored materials do not "fall within those relatively few categories" of speech that may be justifiably somewhat restricted, *Cohen* v. *California*, 403 U.S. 15, 19-20 (1971).

on social and political matters. But for the prison context in which these publications were to be read, no one would suggest that these expressions could be silenced.

Ordinarily, the government may not restrict speech because of its communicative impact—"a fear of how people will react to what the speaker is saying." J. Ely, *Democracy and Distrust* 111 (1980). "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be." *American Booksellers Ass'n, Inc.* v. *Hudnut*, 771 F.2d 323, 327-28 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). Thus, relying on the "free trade in ideas," *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting), if further exchange of ideas can avert the feared harm, governmental suppression is unnecessary.[8]

The government's argument that the censorship undertaken by the Bureau has a *de minimis* impact upon publishers' audiences hardly justifies that censorship. The government cannot legitimize ideological censorship whether it effects one reader or one million readers. Unless the government can demonstrate far more directly than the regulations require that a constitutionally-protected work, if read by the prison population, will likely impair a substantial governmental interest in security, order or rehabilitation, the mere fact that such work is available to be read by non-prisoners forms no basis for censoring the work as to the prison population.

There are, moreover, consequential effects of choking off insightful, if controversial, works from the prison population. Censorship limits the pool of information available to prisoners and necessarily limits their participation in public discourse. "Freedom to distribute information to every citizen wherever

8. Even speech advocating illegal conduct such as the use of violence or crime cannot be proscribed unless the advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). This strict standard thus contemplates both a causal relationship and an element of immediacy. *See Watts* v. *United States*, 394 U.S. 705 (1969); *Bond* v. *Floyd*, 385 U.S. 116, 133-34 (1966).

he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Martin* v. *Struthers*, 319 U.S. 141, 146-47 (1943).

Publications about controversial social and political issues promote public debate on those issues. If particular works dealing with subject matters of interest to an incarcerated person are withheld from him, that individual effectively is shut off from participating in that debate.[9]

Publications discussing prison administration, the penal system and sexuality tackle some of the most important concerns of today's society. Given their vantage point, inmates have a role in informing society about administration of the prisons and about the penal system generally. The Bureau's censorship regulations stifle vital social discourse, in opposition to constitutional mandate, and are deserving of scrutiny under the intermediate standard enunciated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974).

9. "Although committing an illegal act may require the physical segregation . . . it does not dictate that the prisoner's mind be similarly locked away to atrophy during the period of his incarceration." *Abdul Wali* v. *Coughlin*, 754 F.2d 1015, at 1034 (2d Cir. 1985). Moreover,

> "[i]n the close and restrictive atmosphere of a prison, first amendment guarantees taken for granted in society at large assume far greater significance. The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment."

Id. at 1034 n.11, (quoting *Wolfish* v. *Levi*, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell* v. *Wolfish*, 441 U.S. 520, 550-51 (1979) ("publisher-only" rule for receipt of hardcover books upheld as reasonable response to "obvious problem" of preventing smuggling into prison of contraband)).

B. The Censorship Regulations Effect A Prior Restraint On The Dissemination Of Published Materials And Are Therefore Inherently Constitutionally Suspect

Not only are the regulations suspect because of the nature of the speech at issue; they are also suspect as a prior restraint. The regulations have the effect of requiring the government's advance permission prior to publishers communicating their ideas to a prison audience—a form of government restraint that is inherently suspect. *See New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near* v. *Minnesota*, 283 U.S. 697, 713-19 (1931) (major purpose of First Amendment guarantee of free press was to prevent prior restraints upon publication); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-04 (1952) (statute that required motion picture license was prior restraint; communicative event of film showing was "publication"). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), and is only tolerated when operated under close judicial supervision to determine the validity of the restraint. *See Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). *See also Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (regulation "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system"). Because the regulations are inherently suspect as a prior restraint, they should be reviewed under a standard of scrutiny more stringent than the mere "reasonable relationship" test proposed by the government.

C. The Censorship Regulations Lack The Predicate Viewpoint Neutrality Required For Application Of The "Reasonable Relationship" Test In A Prison Context

The regulations require that prison employees examine published materials to determine whether they are "detrimental" to the "security, good order or discipline" of the prison. Necessarily such censorship is content-based. However, any governmental restriction of expression based on the content or viewpoint expressed is constitutionally suspect. "[A]bove all

else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

In non-public forums, some content-based restrictions may be tolerated. *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). The government may restrict speech on the basis of content in a non-public forum as long as the regulations "are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). However, even content-based restrictions must be "viewpoint-neutral." *Cornelius*, 473 U.S. at 811 & 806. "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806.

Within the prison context, this Court has continued to stress the importance of viewpoint neutrality. "Prison officials may not censor . . . simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." *Procunier* v. *Martinez*, 416 U.S. at 413; *accord Turner* v. *Safley*, ____ U.S. ____, 107 S. Ct. 2254, 2264 (1987) ("[t]he rule is content-neutral"); *Bell* v. *Wolfish*, 441 U.S. 520, 551 (1979) ("The [restriction] operates in a neutral fashion, without regard to the content of the expression.") (citing *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974)). Thus, even though this Court has upheld some regulations impacting speech in a prison context if merely reasonably related to penological objectives, *see*, *Turner*, ____ U.S. ____, 107 S. Ct. at 2264 (inmate-to-inmate correspondence); *Wolfish*, 441 U.S. at 550 (hardcover books); *Pell*, 417 U.S. at 828 (face-to-face media interviews with prisoners), it has unwaveringly pronounced that the predicate for applying the "reasonableness" standard to restrictions of expression in non-public forums is viewpoint neutrality: A reasonable justification "will not save a regulation that is in reality a facade for viewpoint discrimination." *Cornelius*, 473 U.S. at 811.

The censorship regime here under review is notable for its absence of viewpoint neutrality. As previously discussed, in practice the regulations allow for censorship based on the personal preferences of prison employees. The rules thereby promote an orthodoxy of views by sanctioning blatant viewpoint exclusion. The employment of "standards" such as "radical," "communist" or "fascist" hardly deserves consideration under the "reasonableness" standard that the government argues should apply.

Even were the issue presented solely to involve the constitutional rights of prisoners, the government could not avoid the weight of authority commanding stricter-than-mere-reasonableness scrutiny of non-viewpoint-neutral regulations simply by arguing the need for deference to penological objectives. Where, as here, speech of non-prisoners is centrally at issue, the government's resort to a "reasonableness" standard carries all-the-less force.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE INTERMEDIATE SCRUTINY STANDARD ENUNCIATED IN *PROCUNIER* V. *MARTINEZ* APPLIES TO THE REVIEW OF PRISON CENSORSHIP REGULATIONS THAT CONSEQUENTIALLY RESTRICT PUBLISHERS' FIRST AMENDMENT RIGHTS

In *Procunier* v. *Martinez*, 416 U.S. 396 (1974), this Court formulated a test to accommodate both the First Amendment rights of non-inmates and the legitimate interest of maintaining security and order in the prisons. That test remains good law[10] and is controlling in this case.

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10. Contrary to petitioners' characterization, the "generally necessary" standard enunciated in *Martinez* has not been abandoned in the prison context in instances in which a regulation works a consequential restriction on non-inmates' constitutional rights. In *Turner* v. *Safley*, ____ U.S. ____, 107 S. Ct. 2254 (1987), this Court implicitly reaffirmed the validity and appli-

(*Footnote continued.*)

A. The Consequential Restriction Of Publishers' First Amendment Rights Triggers Application Of The Standard Of Review Enunciated By This Court In *Martinez*

In *Martinez*, prison inmates challenged a state regulation which proscribed any personal correspondence deemed to "unduly complain" or "magnify grievances," *id.* at 399 n.2, or express "inflammatory political, racial, religious or other views or beliefs," *id.* at 399 n.3. The Court recognized that when a non-prisoner is prohibited from communicating with a prisoner, the rights of the two parties become "inextricably meshed" and censorship of the communication works a consequential restriction of the non-prisoner's First Amendment rights. *Id.* at 409. Because the challenged restriction implicated the First Amendment rights of free citizens, the Court expressly declined to evaluate it under the standard of review applicable if the First Amendment rights of only prisoners were involved. *Id.* at 408-09.

Writing for a unanimous Court, Justice Powell enunciated the standard that the government must meet to justify any censorship of written expression which impacts on non-inmates' rights:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Sec-

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cability of the *Martinez* standard to restrictions of non-inmates' constitutional rights. Striking down a regulation prohibiting inmate marriages, Justice O'Conner wrote that the "implication of the interests of non-prisoners may support application of the *Martinez* standard . . . ." *Turner*, ____ U.S. ____, 107 S. Ct. at 2266. However, because the marriage prohibition could not withstand scrutiny even under the lesser "reasonable relationship" test, the Court had no need to address the issue. *Id.*

> ond, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus, a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.

Id. at 413-14. The impact that the challenged regulations have upon the First Amendment rights of non-prisoners—in this instance, the press—mandates the application of the *Martinez* standard to this case.

B. Publishers Have A "Particularized Interest" In Communicating With Prison Inmates Who Have Requested Specific Published Materials

The government argues that the *Martinez* standard is extremely narrow and applies solely to correspondence between inmates and outsiders. In effect this argument posits that publications mailed to prisoners are less deserving of First Amendment protection than letters because of the relationship between the sender and the recipient. Petitioners' argument not only denigrates the role of the press in our self-government, *see First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. at 781; *Mills* v. *Alabama*, 384 U.S. at 219; it would also apparently institute a hierarchy of First Amendment protections based on the medium (letter versus publication) and identity of the speaker (correspondent versus publisher/author).

Contrary to the government's assertions, communications between publishers and inmates in the form of published materials fall squarely within the scope of the "particularized" communications contemplated by *Martinez* because these materials are mailed to prisoners in response to the inmates' individual requests and subscriptions.[11]

> [A] personal subscription to, or single order of a particular publication more nearly resembles personal correspondence than a mass mailing. Like personal correspondence, a subscription represents the exercise of volition by both sender and recipient. The sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say.

Brooks v. *Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985). Moreover, there can be "no principled basis for distinguishing publications specifically ordered by a prison inmate from letters written to that inmate for purposes of first amendment protection." *Id.* at 1181.

When a publisher mails material at an inmate's request and the inmate reads the material, an important two-way communication has occurred. In effect the inmate has asked the publisher, "What do you have to say?" and the publisher has responded. This communication may spark further discussion of the issues with a new participant—indeed, the prisoner may be inspired to write a letter.[12] This communicative transaction is central to what Justice Brandeis recognized to be our society's preferred means of arriving at the truth: Speech is the tool of its discovery; the more individuals who are allowed to participate, the easier and more informed is that discovery. *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring),

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11. Unlike the censored publications in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977), none of the rejected publications here at issue were part of a bulk mailing to inmates.

12. Under the government's rationale, a letter to the editor written by an inmate would be subject to greater protection, in the form of heightened scrutiny, than the publication that inspired the letter.

overruled on other grounds by Brandenburg v. *Ohio*, 395 U.S. 444 (1969).

Whereas the government argues that the prison regulations "simply reduce the potential audience for a particular issue of a publication," Brief for Petitioner at 21, the right of each publisher to communicate to an inmate through any issue or any publication is indivisible under our Constitution. Just as "[c]ommunication by letter is not accomplished by the act of writing words on paper," *Martinez*, 416 U.S. at 408, expression through publication is not accomplished solely by the act of printing a book, magazine or newspaper. Communication contemplates more than mere creation of speech; it contemplates a receiver. "Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1878), *quoted in Lakewood* v. *Plain Dealer Publishing Co.*, ____ U.S. ____, 108 S. Ct. 2138, 2149-50 (1988). "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 65 n.6 (1963) (citing *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938)).

Recipients of speech are not fungible commodities; each communication between a publisher and an individual reader is unique, valuable, and protected by the First Amendment.[13] Just as a correspondent has a constitutionally protected interest "against unjustified governmental interference with the intended communication," *Martinez*, 416 U.S. at 409, authors and publishers of books and periodicals must enjoy the same protection under the First Amendment.[14]

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13. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

14. A number of circuit courts have recognized a prisoner's First Amendment right to receive printed publications by mail order or subscription. *See, e.g., Pepperling* v. *Crist*, 678 F.2d 787 (9th Cir. 1982); *Trapnell* v. *Riggsby*, 622 F.2d 290 (7th Cir. 1980); *Guajardo* v. *Estelle*, 580 F.2d 748 (5th Cir. 1978).

C. The *Martinez* Standard Is Intermediate, Not Strict, Scrutiny

The government improperly denominates the *Martinez* test a strict scrutiny standard, and thereby postures this case as one requiring a choice between levels of judicial review, of the regulations in issue, that are at opposite ends of the spectrum. In actuality, the intermediate scrutiny test prescribed by *Martinez* can comfortably accommodate the First Amendment rights of non-inmates and the government's penological objectives.

"Strict scrutiny" denotes the most stringent standard of review under which a court will judge government restrictions on First Amendment rights and is framed in language quite different from the *Martinez* test. Under strict scrutiny, regulation of expression is justified only by a showing that the regulation is precisely tailored to serve a "compelling" state interest, *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. at 795, or a "paramount" interest "of vital importance," *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976) ("a significant impairment of First Amendment rights must survive exacting scrutiny"), or to prevent a "clear and present danger," *Brandenburg* v. *Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam) (distinguishing advocacy from "incitement to imminent lawless action"). Strict scrutiny reflects the "heavy justification" required for governmental subordination of the First Amendment's mandate against restraint of expression. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 733 (1971) (White, J., concurring). The strict standard is easily distinguished from the *Martinez* test, which does not require "precise tailoring," a "compelling state interest" or a "clear and present danger," but instead requires that the regulation be "generally necessary to protect one or more legitimate governmental interests." *Martinez*, 416 U.S. at 414.

Although core First Amendment speech is usually given utmost protection, the Court in *Martinez* considered and rejected "strict scrutiny"[15] as the appropriate standard to apply

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15. *See, e.g., Wilkinson* v. *Skinner*, 462 F.2d 670, 672-73 (2d Cir. 1972); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968); *Fortune Soc'y* v. *McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

to consequential restrictions on non-inmate expression in deference to the legitimate penological concerns of the government. *Id.* at 406-07. However, the Court also considered and rejected a standard of review that deferred completely to the decisions of prison officials—the "hands-off" approach.[16] *Id.* at 406.

In fashioning a test that would provide an appropriate level of deference to the government's interest in maintaining security yet accommodate the First Amendment rights of non-inmates, Justice Powell, writing for the Court, favored the "intermediate position," articulated in *Carothers* v. *Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970): A "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." *Martinez*, 416 U.S. at 407 (quoting *Carothers* v. *Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (citations omitted)). Having rejected both the strict scrutiny and the "hands-off" standards of review, the Court examined the intermediate test formulated in *United States* v. *O'Brien*, 391 U.S. 367 (1968), to address an incidental restriction on speech:[17] The Court in *O'Brien* required that the regulation in question further an "important or substantial governmental interest . . . unrelated to the suppression of free expression" and that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest." *Id.* at 377.

In *Martinez*, the Court formulated a standard that combined the teachings of both *Carothers* and *O'Brien*. To pass constitutional muster, a regulation that consequentially restricts non-inmates' First Amendment rights "must be generally necessary

16. *See, e.g., McCloskey* v. *Maryland*, 337 F.2d 72 (4th Cir. 1964); *Krupnick* v. *Crouse*, 366 F.2d 851 (10th Cir. 1966).

17. In *United States* v. *O'Brien*, 391 U.S. 367 (1968), petitioner had been convicted for burning his draft registration certificate under a federal statute prohibiting such mutilations. Even though the regulation restricted O'Brien's free expression, the Court upheld the statute as a valid means of furthering an important governmental interest.

to protect one or more of the legitimate governmental interests . . . . " *Martinez*, 416 U.S. at 414.

The *Martinez* intermediate standard gives due deference to prison officials. It recognizes that prison officials need reasonable latitude to determine how to meet security and other objectives. However, it also recognizes that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06 (citing *Johnson* v. *Avery*, 393 U.S. 483, 486 (1969)).

Contrary to the government's assertions, the *Martinez* standard is not without force. If a regulation is no more intrusive than generally necessary to further an important or substantial governmental interest unrelated to the suppression of expression, it will withstand intermediate scrutiny. *Martinez*, 416 U.S. at 413-18. Indeed, numerous prison censorship regulations have been *upheld* under the *Martinez* standard. *See Espinoza* v. *Wilson*, 814 F.2d 1093, 1098-99 (6th Cir. 1987) (upholding ban on certain homosexual publications in Kentucky prison in deference to warden's determination, supported by evidence of murder and mutilation directly linked to homosexual activity, that publications posed security problem); *Meadows* v. *Hopkins*, 713 F.2d 206, 211 (6th Cir. 1983) (upholding censorship regulation that authorized prison staff to read all general correspondence and "delineate[d] with specificity material which is deemed censorable"); *Vodicka* v. *Phelps*, 624 F.2d 569, 571 (5th Cir. 1980) (upholding Louisiana prison regulation barring admission into prison of publications determined to constitute "an immediate threat" to security; regulation at issue was tailored "to ban only those publications which pose a real threat to the security and order of the institution."); *Carpenter* v. *South Dakota*, 536 F.2d 759 (8th Cir. 1976) (upholding censorship of mail containing sexually explicit material), *cert. denied*, 431 U.S. 931 (1977).

That application of the *Martinez* standard to the instant regulations requires the striking down of a regulation wholly insensitive to First Amendment concerns forms no basis for doubting the soundness of *Martinez*. Rather, it reflects the continuing need for a careful, and practical, judicial balancing of interests in the prison setting where important First Amendment interests are at stake.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully urge that this Court affirm the decision and order of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

R. BRUCE RICH
Counsel of Record

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for the AMICI CURIAE

HOLLY J. GREGORY
WEIL, GOTSHAL & MANGES

Of Counsel